In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1122

ALBINA ENGINE AND MACHINE WORKS, ET AL., PETITIONERS

v.

J. J. O'LEARY, DEPUTY COMMISSIONER, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the District of Oregon (R. 57)[1] is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 328 F. 2d 877.

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[1] "R." references are to the Transcript of Record submitted in the court of appeals and filed here pursuant to Rule 21 of this Court.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1964. The petition for a writ of certiorari was filed on May 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether both courts below correctly upheld the Deputy Commissioner's determination that under applicable state law the claimant was the deceased employee's "surviving wife" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act and thus entitled to widow's benefits.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*) provides in pertinent part:

> Sec. 2 DEFINITIONS.—When used in this chapter—
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> * * * *
>
> (16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.
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> * * * *
>
> Sec. 9 Compensation for death—
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> If the injury causes death, the compensation shall be known as a death benefit and shall be

payable in the amount and to or for the benefit of the persons following:

* * * * *

(b) If there be a surviving wife or dependent husband and no child of the deceased, to such surviving wife or dependent husband 35 percentum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each such child; * * *.

STATEMENT

Petitioners—an employer and its insurance carrier—brought this action in the district court against the Deputy Commissioner to set aside an award of widow's benefits to a dependent of a deceased employee. The pertinent facts may be summarized as follows:

In Middleton, Idaho, in November 1938, the claimant and the decedent, John C. O'Brien, commenced to live together as husband and wife, and they continued to do so until decedent's death, some twenty-three years later. The claimant immediately assumed the name of Hilda O'Brien (R. 19, 20). Two of their three children were born in Idaho; the third, in Oregon, where the couple resided from September of 1942 until the decedent's death (R. 20, 21). Until these proceedings, the children were unaware of the fact that their parents had never been married in a

civil or religious ceremony (R. 23). While residing in Idaho, the claimant voted under the name of Hilda O'Brien (R. 22) and filed joint tax returns with the decedent, as husband and wife (R. 24). In 1950 they jointly purchased property in Portland, Oregon (R. 21-22). Each year from 1942 until the decedent's accident in 1956 they returned to Idaho with their children, spending a week or two visiting their parents (R. 22). From November of 1938 John and Hilda O'Brien were accepted as husband and wife by their families and the communities in which they lived (R. 46-52).

In 1928 the decedent had married one Goldie J. Harper, and, although they were separated in 1937, the marriage was not formally dissolved until 1943. The existence of that undissolved prior marriage prevented a valid marriage between claimant and decedent at the inception of their relationship. While Oregon, the state in which they were domiciled from 1942 on, requires the formal solemnization of local marriages, Idaho recognizes non-ceremonial marriages. Noting that the claimant and the decedent had resided in Idaho from 1938 to 1942, and that two of their three children were born in Idaho, the Deputy Commissioner concluded (R. 10) that "the annual visits of the deceased and the claimant to Idaho after the dissolution of the marriage of the deceased on April 10, 1943, were sufficient to create or confirm the marital relationship which existed between the deceased and the claimant from 1938 until his death in 1961 * * *" and that the claimant "is the surviv-

ing wife of the deceased and as such is entitled to death benefits for her support at the rate of $28.35 per week * * *."

Petitioners instituted the present action to have the award set aside on the ground that the claimant was not the decedent's "surviving wife" (R. 7). The district court dismissed the complaint (R. 57-58), and the court of appeals affirmed, holding (a) that while the Oregon courts construe the local marriage statutes as requiring the formal solemnization of marriage, they recognize the validity of non-ceremonial marriages validly contracted elsewhere; and (b) that the facts at bar were sufficient to establish a common-law marriage under Idaho law.

ARGUMENT

In this action petitioners challenge the Deputy Commissioner's decision that the claimant qualified as a surviving wife under the Longshoremen's and Harbor Workers' Compensation Act. That decision turns solely upon the application of local law to an analysis of the particular facts of this case. The propriety of the administrative determination was carefully considered and approved by both courts below. There is no occasion for further review by this Court.

The Longshoremen's Act provides for the payment of death benefits to the "surviving wife" of a deceased employee. However, since the statute does not specifically define that term, it must be construed in each case by reference to applicable state law. See *Seaboard Air Line* v. *Kenney*, 240 U.S. 489, 493-494.

See also: *Green* v. *Crowell*, 69 F. 2d 762 (C.A. 5); *Bolin* v. *Marshall*, 76 F. 2d 668 (C.A. 9); *Turnbull* v. *Cyr*, 188 F. 2d 455 (C.A. 9); *Keyway Stevedoring Co.* v. *Clark*, 43 F. 2d 983 (D. Md.).

Petitioners do not dispute the Ninth Circuit's conclusion that, under the Oregon law of workmen's compensation, a woman may, though not formally married, be entitled to death benefits. They insist, however, that, for purposes of defining "surviving wife" as that term is used in the Longshoremen's Act, reference must be made solely to local domestic relations law. This contention overlooks the fact that the court below also considered the Oregon domestic relations law and concluded that Oregon would consider the claimant to be the "surviving wife" of John C. O'Brien. This anaylsis of Oregon law is correct. While Oregon courts hold that the statutes of that State requiring the formal solemnization of marriage are mandatory, they also hold that a "relationship recognized as a marriage in another state where it was consummated will be recognized in Oregon even though such a relationship would not be a marriage if the same facts had been relied upon to create a marriage in Oregon." *Boykin* v. *State Industrial Acc. Comm'n.*, 224 Ore. 76, 81-82, 355 P. 2d 724, 727 (1960). In this regard, Oregon adheres to the general rule that a marriage, valid where contracted, will be considered valid by the courts of the domicile. *Loughran* v. *Loughran*, 292 U.S. 216, 223.

Petitioners suggest that common-law marriages are so repugnant to Oregon public policy that the Oregon courts would decline to follow the

general rule where its residents enter into non-ceremonial marriages in a sister-state. We find no support for that contention in Oregon law. While the courts of Oregon may refuse to honor marriages which are deemed offensive to Oregon public policy, this prerogative has been invoked only with respect to marriages "which are deemed contrary to the law of nature as generally recognized in Christian countries, such as involve polygamy and incest, and marriages which the local lawmaking power has declared shall not be allowed any validity, either in express terms or by necessary implication * * *." *Sturgis* v. *Sturgis*, 51 Ore. 10, 16, 93 Pac. 696, 698 (1908). Indeed, in *Boykin* v. *State Industrial Acc. Comm'n.*, 224 Ore. 76, 85, 355 P. 2d 724, 728 (1960), the Supreme Court of Oregon expressly held that a common-law marriage "being valid in Idaho, is entitled to recognition in Oregon." [2]

Under the pertinent Idaho statutes, a valid common-law marriage has two prerequisites: (1) "the consent of parties," and (2) "mutual assumption of mar-

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[2] Even absent the express pronouncement in *Boykin*, the fact that the Oregon Workmen's Compensation statute comparable to the Longshoremen's Act provides for the payment of compensation to wives and children of common-law marriages contracted in sister-states (Ore. Rev. Stat. § 656.226) conclusively demonstrates that such marriages are not repugnant to Oregon public policy. *Huard* v. *McTeigh*, 113 Ore. 279, 232 Pac. 658 (1925), relied upon by petitioners in support of their assertion that common-law marriages are repugnant to Oregon public policy is plainly distinguishable. There the court was concerned with whether a valid common-law marriage could be contracted in Oregon. In answering in the negative it recognized that full effect would be given in Oregon to a common-law marriage validly contracted in a sister state. 113 Ore. at 287, 232 Pac. at 660.

ital rights, duties or obligations," Idaho Code, Sec. 32-201 (1947); *Huff* v. *Huff*, 20 Idaho 450, 118 Pac. 1080. The Deputy Commissioner properly found that the elements were present here. Moreover, where, as here, a legal impediment to a valid common-law marriage—*e.g.*, a prior undissolved marriage—is subsequently removed, mere continuance of the prior relationship will suffice to establish a valid common-law marriage. *Huff* v. *Huff*, *supra*; *Thomey* v. *Thomey*, 67 Idaho 393, 397, 181 P. 2d 777, 779. Reviewing the substantial ties that the claimant and Mr. O'Brien had with Idaho, and noting that the "Idaho Supreme Court has repeatedly affirmed that 'the rule adopted in this jurisdiction is that * * * every intendment of the law leans to matrimony'" (Pet. 25), the court below upheld that finding, which was conclusive if supported by substantial evidence. *Green* v. *Crowell*, 69 F. 2d 762, 764 (C.A. 5); *Turnbull* v. *Cyr*, 188 F. 2d 455, 456 (C.A. 9).[3] See also, *South Chicago Co.* v. *Bassett*, 309 U.S. 251, 258.

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[3] Petitioners' contention—that in failing to detail the basis for his finding that a valid Idaho marriage had been contracted, the Deputy Commissioner violated the Administrative Procedure Act—is plainly insubstantial. As the court below noted, "it borders on the frivolous to suggest that the conduct of John and Hilda in Idaho, even if confined to the period after 1943, did not show consent to marriage and mutual assumption of marital duties, thus satisfying the requirements of Idaho Code § 32-201 (1947)" (Pet. 26). Petitioner does not suggest that the Deputy Commissioner's finding is so vague as to frustrate their ability to attack it. Indeed, petitioners fully appreciate the subsidiary issues which the Deputy Commissioner had to resolve in arriving at his ultimate finding (Pet. 10), yet they have made no effort to attack their resolution. The record at bar would surely preclude any such attack.

The only remaining question is whether (a) the Idaho courts would decline to recognize the validity of the marriage, or (b) the Oregon courts would refuse to apply Idaho law, on the ground that the parties were domiciled in Oregon at the time that the decedent's prior marriage was formally dissolved and the impediment to the common-law marriage thus removed. We find nothing in the decisions or statutes of either state which would suggest that its courts would attach decisive significance to the domiciliary status of the parties at the time the impediment was removed. In any event, it is plain that these unresolved issues of Idaho domestic relations law and of Oregon conflicts law are not of such general importance as to require resolution by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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